

Supreme Court, U.S.
FILED
JUN 11 1979

IN THE SUPREME COURT OF THE UNITED STATES DOAK, JR., CLERK

OCTOBER TERM 1979

78 - 1899 NO _____
FRAUD AND DECEIT ACTION

LOWER COURT, C.A. 275,1976
TRIAL COURT, C.A. 868,1976

PETITION FOR WRIT OF CERTIORARI

RICHARD F. DEMOSS AND
WILLIAM J. BARRENTINE
JOINT TENANTS OR SURVIVOR
2515 DEEPWOOD DRIVE
WILMINGTON, DELAWARE
19810

PETITIONERS

v.

INDIAN HEAD, INC., et al.
C/O MORRIS, NICHOL, ARST & TUNNELL
WALTER L. PEPPERMAN, II
ATTORNEYS FOR RESPONDENTS

12TH & MARKET STREETS
WILMINGTON, DELAWARE
19899

DATED: JUNE 11, 1979

I. (a) REFERENCE TO UNREPORTED OPINION
APPENDIX #

OPINION OF THE LOWER COURT	1
DENIAL OF REHEARING BY LOWER COURT	2
OPINION OF TRIAL COURT	3
DENIAL OF REHEARING IN TRIAL COURT	4

I. (b) CONSIDERATIONS GOVERNING

1. The lower court has decided this case not in accord with applicable decisions in this court, on questions of rights.
2. The lower court has rendered their decision in conflict with their lower court, as well as others and not applicable to decisions of this Court, which applies to Federal questions of rights.
3. The lower court has refused petitioners the right to obtain "discoveries".
4. Jury trial was denied by the lower court on fraud and deceit action, but allowed others, petitioners sought damages in court.
5. For the first time, this Court can decide a far reaching and important question of determining, whether, in this case and applicable to hundreds of corporate contracts, wherein the words, "subject to Board of Director approval", is no more than a collateral warranty, when prior delegation of authority has been given to company officers to complete contracts, as was in this case, and the callous refusal to comply with such discoveries, and the refusal of the

courts to order such discoveries, affected the rights under the Constitution.

6. Owing to departure from Federal Procedures by the lower court, this Court should exercise advisory supervision of this action.

I. (i) Judgment of the lower court affirming this decision of trial court:

Submitted November 27, 1978.

Decided December 18, 1978.

(ii) Petition for rehearing denied on January 12, 1979.

EXTENSION OF TIME GRANTED TO JUNE 11, 1979.

(iii) The Statutory Provision believed for leave to file Writ of Certiorari is based upon 28 USCA 1257, (15, 62, 107, 108, 109, 110, 194, 403), and this matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

I. (c) QUESTIONS PRESENTED FOR REVIEW

1. Discovery enjoined in civil litigation during concurrent action below, show discrimination and prejudice, and without regard to Federal and State Constitutions.
2. Discovery allowed others in prior civil action, below, and similar, and refusal of rights to petitioners shows discrimination and prejudice.
3. The lower court in prior actions ruled, whereby, in fraud and deceit actions should be tried by a jury, since

petitioners were denied a trial by jury of the merits and determination of the fraud and deceit issue, and such refusal showed prejudice and discrimination, and was without regard to Federal rights.

4. The lower court in not adhering to their state rules, pertaining to their right to review constitutional question, on procedural grounds, shows discrimination and infringement of the rights of petitioners.

5. The lower court in not following state rules, whereby, concealed fraud, arrests the statute of limitations, and without regard to petitioners rights.

6. The lower court, in reliance of a nonjurisdictional opinion of state equity court, fatally affected the petitioners' rights.

7. The lower court, in not relying on a later opinion of equity court that had jurisdiction, willfully affected the rights of petitioners.

8. The lower courts, decided in prior civil actions, where claim has been timely filed, (in this case praecipe was filed), that strict rules of procedures were not adhered to, yet in this action the opposite view was taken, even though petitioners were in compliance with Statute of Limitations and its "saving clause", thus, petitioners were discriminated against without regard to Federal claims.

I. (d) CONSTITUTION PROVISIONS INVOLVED

United States Constitution Amendment VII, civil trial

for fraud and damages. U. S. Code Annotated, Title 28, Judicial Procedure, Sec. 1257, State Courts, App. #12., 14th amendment, sec.1.

(15). Determination, at 156.

(62). Federal questions, at 182.

(107). Res judicata, at 220.

(108). Due process, page 220, 237.

(109). Jury trial, at 220.

(110). Burden of proof, at 220.

(194). Full faith and credit clause, 241.

(403). Denial of Federal rights, at 318.

Delaware Code Annotated, Vol. 13, Chancery Court Rules, (App.#13):

Rule 3, (a), (b), Rule 4, (a), Rule 12, (a),
note 3, 59, (a). Rule

Delaware Code Annotated, Vol. 13, Supreme Court Rules (App. 14):

Rule 5, (7), note 3, note 4, note 14, note 17,
Rule 14, (2).

10 Delaware Code 8106, Statute of Limitations.

10 Delaware Code 8118, Savings Clause.

10 Delaware Code 1901, Removal of actions.

I. (e), (f). STATEMENT OF THE CASE

Barrentine, (petitioner), entered suit against respondent in the court of chancery claiming fraud and deceit, seeking damages. That court, after declaring no contract had been entered into, stated, in addition, (App. 9), Page 3, last paragraphs:

"***Insofar as plaintiff seeks damages sounding in tort, he has an adequate remedy at law.

Defendant's motion to dismiss the complaint is hereby granted subject to the provisions of 10 Del. C., Sec. 1901."

Note, plaintiff by pleading and noting the reference to 10 Del. C. 1901, at page 6, of trial court docket entry #33 - the direct pleading is to "due course". The trial court at page 1, third paragraph of App.3 , indicated collateral estoppel, not realizing chancery's opinion referred to aspects of the contract, but not to the legal claims sounding in tort. The lower court also ignored the right of legal action directed by the chancery decision (Barrentine action, 4461), App. 9 , also see App. #12, note 194. Petitioner followed Delaware procedurals, and was in compliance when pluries summons was accomplished. See T. C. docket entries #11 and complaint at #1.

During that chancery action, (Barrentine action), The Base Company, a former litigant of respondents, (4175), petitioned Vice Chancellor Marvel, a "Bill of Review", charging fraud and deceit in a prior action, which had been affirmed on appeal, adversely to Base. The defense, Indian Head, neglected to file a bill of exceptions; Base then filed a motion for default, for failure of respondent to defend. That motion also was not defended. The Vice Chancellor advised the Base Company, (DeMoss was president),

"****the case was closed****", and that the Delaware Supreme Court had affirmed. See App. #7. The courts below, in not giving full faith and credit to Chancery's decision, allowing legal action, was an abuse of the petitioner's Federal rights. See direct pleadings to "rights", T. C. docket entry #21, page II, Arg. #5.1, under, 46 Am. Jur. 2d., Para. 610, at 769, both courts, noted before, still claimed collateral estoppel. See also App. 12, note 403 and note 194.

After an appeal on the Barrentine action, the petitioner, acting pro se, discovered the provisions of 10 Del. C. 1901, and the legal opportunity in the Superior Court. Petitioners joined forces and filed action in the trial court for fraud and deceit, (for description, see App. 15), filing letter of demand, complaint and praecipe, inadvertently leaving address of Indian Head off the praecipe.

Petitioners also made personal service on attorney who was defending the appeal, at that moment, to the lower court. The respondent failed to file a bill of exceptions or defend, the petitioners, thereafter, took default judgment on advice of the prothonotary that sheriff's service had been accomplished. The respondents had default judgment removed for lack of jurisdiction, while petitioners were out of state, and without adequate notice to petitioners (note - the similarity of failure to defend as in the chancery bill of review). Actual pluries service was finally accom-

plished on January 6, 1977, less than six months and in conformity with trial court rules. See T. C. docket entry #1 for complaint, and for pluries served, see T. C., D. E. #8. This was direct pleading of due course and equal rights also. See App. 12, note 107, 108. The opinion of the trial court, App. 3 , at page 2, ignored the pluries summon, at paragraph 2,

"****This action suffered immediately from plaintiffs' lack of knowledge of the procedural and substantive law.****"

The lower court opinion does not show or indicate the service or pluries summons, (App. 1). Chancery sent the records of the Barrentine action, (4461), to the lower court but did not include the May 22, 1976 letter re: Base. See App. 7 , and such opinions were not part of the records affirmed by the lower court on September 9, 1976. See App. 8# , for the actual decision affirmed. App. 9 shows affirmation). This lack of jurisdiction, noted at trial court, (D.E. #33, page 2). See App. #13, rule 59. The trial court treated the above May 22 opinion at App. #1, page 4, para. #3, as being litigated; this assumption of litigation, without joining of parties and lack of jurisdiction, materially affected petitioners' rights under 14th Amendment. The assumption of the lower court, in App. 1 , para. , (prior to (4)), that they had affirmed the June 14, 1976 letter was not true, falsely, and will fully affected the very rights of the plaintiffs below, and in the petition for reargument,

the error was pointed out, the lower court's answer was "not reversible error". (App. #1, note (7). The respondents, not satisfied in having the default judgment removed, took civil action in the court of chancery, (Indian Head, Inc. v. Barrentine and DeMoss, see App. #11, for that attempt to prove collateral estoppel and res judicata, which failed. See page 1, second paragraph of rights, appendix no.11. See first instance of rights, at trial court D. E. #33, page 5, under res judicata. The lower courts both ignored that opinion of chancery, (App. 11), and at App. #1, para. (I), the lower court still decided that res judicata and collateral estoppel was applicable, even though the January 3, 1977 opinion, (App. #11), was the last opinion of chancery, and the fact that the vice chancellor had the June 14, 1976 letter opinion and the May 22, 1976 letter on file, and rendered the favorable opinion (II), and the courts' treatment of same affected the rights under the 14th Amendment, Sec. I. See App.12 notes 62, 107, 108, 110, 194, 403, and see App. 14, rule 7, note 17.

Respondents in the trial court refused to honor request for important documents and refused interrogatories, which were in form of admissions; motion for compelling discoveries were stayed by the trial court. See App. #3, page 3, second para. The petitioners at trial court D. E. 2, 18, 24, requested dis-

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coveries, and at D. E. #33, page 4, relating to "inherent rights". See also App. #12, note 110. The trial court's answer was, "****all the issues have been decided****". See second paragraph of App. #4. The petitioners requested a jury trial at trial court D. E. 21, and on petition for reargument, D. E. #33, this refusal of jury trial affected the rights under the 7th amendment and in conformity with prior decisions of the lower court on suits for fraud and negligence actions. Only after the trial court refused the trial of merits were these "rights" affected. In original appeal to the lower court, petitioners quoted the 7th, 9th and 14th amendments and elsewhere.

I. (h) ARGUMENT

(I-2) Respondent has consistently refused discoveries which reveal the items of fraud and deceit. See App. # 15for description of these items. The lower court, also, would not approve mandate for these discoveries, yet these discoveries were allowed others, and in one case, the lower court faulted litigant for not obtaining discoveries. See re:

Hicks v. Soroka, Del. Supre.,
188 A. 2d., at 136, note 1, (1963),

See also Societe Internationale v. Rogers, 78 S. Ct. 1087, (1958), at 212, regarding discoveries. See also , on question of fraud and discoveries, re:

Garcia v. Bernabe, U. S. Ct. Apps.
1st circ., 289 F. 2d 690 (1961), at 692.

(3). Even though the lower court was aware of request for jury trial, and ignoring the question of concealed fraud, and (still concealed), not recognizing these items, (including discoveries), were of a constitutional and of public policy, and necessarily affecting the appellants' right to a civil trial under the 7th amendment. The appellants were appalled at the lower court's opinion, stating "no reversible error". See App. #1, at page 3, (7).

(4). The petitioners pleaded in the trial court for a jury trial, discoveries, statute of limitations, (D. E. #21, at 15, last paragraph, savings clause, D. E. #28, item (C), and conformed to rules of procedure, by filing claim, praecipe, and pluries summons served within six months, in accordance with rules of court, including pleadings to "rights", and Constitutional amendments in the lower court. See in re:

Mundy v. Holden, Del Supre. Ct.,
204 A 2d 83, (1964),

regarding speedy end to litigation, (note, since fraud is still concealed), included in that citation was reference to Kerbs v. California Eastern Airways, Del. Supre. 90 A 2d 652, (1952), referencing rule 7, note 14, see App.14 , also #5. rule

(5). The original action, Base v. Indian, C. A. 4175, Del. Ch., (1973), was on contract performance, fraud was not pleaded, nor did the attorney for Base have the special expertise to discover fraud although he

used "due diligence", in attempting to have Indian Head conform to Condition Precedent, Chancery Rule 9 (c), regarding, and Base stating that prior delegation of authority had been given to the company's officers, and obtaining copy of previous board meeting where such approval was delegated, but Vice Chancellor overruled the request that Indian Head comply with Rule 9 (c). Affidavits were presented by the defense to the effect that board approval was required. See App. 5 , page 3, 2nd and last paragraph, but note the rejection of due diligence of Base's attorney and, further, no amount of diligence would have discovered that Indian Head had agreed to sell to others while having a contract with Base, but held, or delayed notifying Base until damages had occurred, deliberately, and willfully concealed that knowledge of the pending contract cancellation, although in daily contact with petitioners, for the reason they (Indian Head) were not sure the new contracted party could raise the capital required, as once before, that same group attempted to buy certain marginal assets from Indian Head, but could not raise the money required. If that group had been unable to raise the capital, the question arises, would they, (Indian Head) have sold to Base, whereby, they had a signed preliminary contract, and also a more formal contract with seal affixed and signed by Base. Is it no wonder the refusal of respondents to comply with discoveries, which would reveal

the entire story of fraud and deceit affecting Barrentine and DeMoss who resigned prior executive positions, based upon words and deeds of respondents who willfully concealed impending contract termination. Note: this question is a national one of corporate strategy and potentially fraudulent and should be reviewed by this Court.

(6-7). The courts below selected one of several opinions of the court of Chancery and the June 14, 1976 opinion selected lacked jurisdiction for the following reasons: first, it was noted previously that Chancery cannot pass judgment on any case that has been appealed; (App. 13 , rule 59); second, there was no joining of the parties, the defendant in that case ignored the petition for review; third, rules of chancery were ignored by that petition for Bill of Review. There was no complaint, no praecipe, no deposit for costs, no setting of schedules of briefs, no arguments at any hearing or trial, just the letter stating the case was closed, and the unusual turn-up of the third opinion on C. A. 4175, which was never sent to the lower court by the court of chancery. Petitioner suggested that unusual opinion should have been investigated, but was ignored by the lower court, even the argument date shown was wrong; the actual date of argument was on March 30, 1976.

i. COMPANION CASES - unreported

APP. #

The Base Company v. Indian Head, Inc.
Del. Ch. C. A. 4175, dated November 26, 1973
action for specific contract performance.

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Affirmed by Del. Supreme Ct. on October 18,
1974, 344 A 2d 384, Reported, affirmed.

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*Petition for Bill of Review re:

The Base Company v. Indian Head, Inc.
on C. A. 4175, Del. Ch., dated May 22, 1976
as result of alleged fraud, seeking damages.

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*Petition for Bill of Review re:

The Base Company v. Indian Head, Inc.
on C. A. 4175, Del. Ch., dated June 14, 1976
* (Note - reported affirmed, on October 18,
1974, 344 A 2d 384, in error, on lower court
opinion, see App. # 1, assuming prior juris-
diction.)

8

Barrentine v. Indian Head, Inc., Del. Ch. C. A.
4461, dated May 21, 1976, action for fraud and
deceit, seeking damages.

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Affirmed by Del. Supreme Ct. on September
9, 1976, (reported, affirmed, 365 A 2d 136,
(1976).

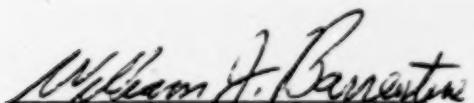
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Indian Head, Inc. v. DeMoss and Barrentine
Del. Ch. C. A. 5208, dated January 3, 1977,
seeking injunctive relief.

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CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted in order that petitioners may have their day in court.



William J. Barrentine and
Richard F. DeMoss
Joint Tenants in Common
or Survivor
Petitioners

cc: W. L. Pepperman, II, Esq. (3)

Dated: June 11, 1979